also if the trade was a fraudulent trade, I have no doubt that no action could be maintained."

In *Palmer v. Harris*, 8 Am. Law Reg. N. S. 137 (10 P. F. Smith 156), plaintiff sold cigars, made in New York, and used a label with the words "*Golden Crown, L. P. Habana*" thereon. Sometime afterwards defendant began using a somewhat similar label, on which were the words "*Golden Crown, Fabrica de Tabacos de les Mejores Vegas*, &c.," and outside the border in small letters "Ent. according to Act of Congress, A. D. 1858, by Lorin Palmer, in the c'k's office in d't'c't of the S. d't of N. Y." Defence was that complainant's trade-mark was untrue, as his segars were manufactured in New York. An injunction was refused on this ground.

As regards what is *colorable imitation*, see the late case of *Cope v. Evans*, 30 L. T. R. N. S. 292 (May 2d 1874).

A. S. B.

(*To be continued.*)

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD CO. *v.* STINGER.

The plaintiff was driving a horse known to be afraid of locomotives upon a road parallel and contiguous to defendants' railroad. The engineer of an approaching train blew the whistle of the locomotive once or twice (there being conflicting evidence on this point), which caused the horse to run off, and the plaintiff was thereby thrown from the vehicle and injured.

Held, that the question whether the use of the whistle the second time was negligent was for the jury, but not whether any use thereof was such. The nature of the place and the habit of the company were conclusive that the whistle should be blown once, and the jury should not have been permitted to say that this was negligence.

Held, further, that the use of a horse known to be afraid of locomotives in the vicinity of a railroad was contributory negligence.

CASE for negligence. The *narr.* contained a single count, averring that the plaintiff was on September 1st 1871, lawfully driving his horse and wagon along Gray's Ferry Road, by the side of which a part of defendants' railroad is situated; that then and there the defendants so carelessly and improperly propelled a locomotive and train of cars along their said road, and made such great noise and shrieks by blowing the whistle of the said locomotive, that by the defendants' carelessness, the plaintiff's horse

was frightened and ran away, and the plaintiff was thrown from his wagon and greatly injured. Plea, "Not guilty."

The accident occurred upon Gray's Ferry Road, at a point east of Gray's Ferry Bridge, which crosses the Schuylkill river some distance beyond. The locality and character of the road, where the accident happened, are described in the opinion of the court.

Defendants' *sixth point* was that if the plaintiff knew that his horse was easily frightened by locomotives, it was negligence on his part to drive such a horse along Gray's Ferry Road in close proximity to the railroad; and if the plaintiff's horse while being so driven became frightened, he cannot recover.

Answer of the judge below: ["I decline so to charge you. The law will not banish horses from highways because locomotives cross or traverse them. The effect of a man having a horse liable to fright from a locomotive would be to require him to use a greater degree of care. It would impose upon him the duty not to bring the horse in contact with an engine unnecessarily; but here there was no other road. The law does not compel a man to go out of his road a mile or more even to avoid such danger. He must be more watchful. If he approach a railroad with such a horse, he ought to look out for trains. If he saw a train it would be his duty to keep out of the way, or, if overtaken on the route and he should find that the locomotive was upon him, he should get out and hold the horse by his head; but it is not contributory negligence itself to go there with such a horse. It did impose a greater degree of caution."]

Verdict for plaintiff and judgment thereon. The defendants took this writ of error. The answer enclosed in brackets was assigned for error.

James E. Gowen (with whom was *Thomas Hart, Jr.*), for plaintiffs in error.—As to the use of steam-whistles, see Wharton on Negligence, §§ 836, 898; Sh. & Redf. on Negligence, § 466 and note 1; *Burton* v. *P., W. & B. Railroad Co.*, 4 Harrington 252; *Bordentown & S. Amb. Turnp. Co.* v. *C. & A. Railroad Co.*, 2 Harrison 314; *King* v. *Pease*, 4 B. & Ad. 30.

Dropsie, contrà, cited *Huyett* v. *Phila. & Read. Railroad Co.*, 11 Harris 374; *McCully* v. *Clarke*, 4 Wright 408; *Lack. & Bloomsburg Railroad Co.* v. *Doak*, 2 P. F. Smith 31; *Tr. & Bristol Turnp. Co.* v. *Phila. & Tr. Railroad Co.*, 4 P. F. Smith 350.

The opinion of the court was delivered by

PAXSON, J.—This case presents two questions. The first is, whether the engineer of the train was guilty of negligence in blowing the alarm-whistle; the second, whether the plaintiff below was chargeable with contributory negligence in driving a horse admitted by him to be afraid of the cars, upon Gray's Ferry Road, alongside of the railroad, at the time in question.

Negligence has been defined to be the absence of care according to the circumstances: *Turnpike Co.* v. *Railroad Co.*, 4 P. F. Smith 345. In some cases the blowing of the steam-whistle of a locomotive has been held to be negligence; in others the omission to do so has been treated as negligence. Yet there is no want of harmony between these apparently conflicting decisions. The character of the act depends upon the circumstances accompanying it. Thus, it is clearly the duty of an engineer, when his train approaches a public highway, if danger is to be apprehended, to give warning by sounding the whistle, or other sufficient alarm. The failure to do so would be negligence *per se*. For while negligence is usually a question of fact for a jury, there are some cases in which a court can determine what omissions constitute negligence. They are those in which the precise measure of duty is determinate—the same under all circumstances. Where the duty is defined, a failure to perform it is, of course, negligence, and may be so declared by the court: *McCully* v. *Clark*, 4 Wright 406. On the other hand, the wanton and unnecessary sounding of the whistle has been held to be negligence. *Penna. Railroad Co.* v. *Barnett*, 9 P. F. Smith 259, illustrates both of the views suggested. In that case the engineer of the train, having given no notice of its approach, blew his whistle under a bridge whilst a traveller was passing over it, by means whereof his horses took fright, ran off and injured him. It was held that the omission to give notice, by whistling or other signal, of the approach of the train to the bridge, as well as the blowing of the whistle while the engine was under the bridge, there being no apparent necessity therefor, was properly left to the jury as evidence of negligence.

The plaintiffs in error, having a right under their charter to propel their cars by the use of steam, are not to be held responsible in damages for injuries resulting from the proper use of such an agency. It was held in *The Turnpike Co.* v. *The Railroad Co.*, before cited, that a loss of property adjacent to a railroad from

the sparks of a locomotive, apart from misuse, is *damnum absque injuria*. It was said by the present Chief Justice, in delivering the opinion of the court in that case, "the law, in conferring the right to use an element of danger, protects the person using it, except for the abuse of his privilege." It may, therefore, be safely assumed that the company are not liable for injuries resulting from the use of their cars where due care is exercised. The noise of a rapidly moving train, as well as the sound of the whistle, may alarm a horse and cause an accident. Whether such accident imposes a liability upon the company to make compensation in damages, must depend to a great extent upon the fact whether it was the result of a want of proper care on the part of the persons in charge of such train.

What is proper care cannot be determined by any fixed rule of law. It must depend upon the facts of the particular case. That which would be due care in running a train through a sparsely settled, rural district, might be negligence, if not actual recklessness, in approaching a large city. The steam-whistle is one of the recognised methods of signalling the approach of a train. Its universal use upon railroads is a strong argument in favor of its efficiency. It is shrill and piercing; can be heard for a great distance, and can be mistaken for nothing else. Yet it has disadvantages. More than all other sounds, it is a terror to animals unaccustomed to its warning. Where trains are passing through the built-up portions of towns and cities, it is not needed or often used. In such cases they move slowly, and the ringing of a bell sufficiently answers the purposes of an alarm, and is not so likely to frighten horses. But where it is necessary to warn crossings or bridges at a distance in advance of the train, no sufficient substitute has yet been found for the whistle. It can be heard in any condition of wind and weather. In the absence of the discovery of any suitable substitute, and in view of its use upon all roads operated by steam, the mere fact of the whistling furnishes no presumption of negligence. Was the whistle used in such a wanton manner as to amount to negligence? The learned judge left this question to the jury, and in so far he was right. But he also left it for the jury to decide whether the use of the whistle at all in that particular place was negligence. The train had passed beyond the closely built-up portion of the city, which ended at Twenty-eighth street, and there were but few houses between that

point and Gray's Ferry Bridge. The engineer whistled about Thirtieth street. The plaintiff says he whistled twice; that the first whistle frightened his horse, and it commenced to run; that just as he was getting it under control there was a second "blast" from the whistle, and his horse then became unmanageable, threw him out, and the wagon passed over him. Gray's Ferry Road and the railroad at this point are side by side. The train and the plaintiff were going in the same direction, and at the moment when the accident occurred the train had nearly overhauled him. It was a disputed fact whether the whistle was sounded once or twice in this vicinity. The conductor, engineer and fireman of the train, and other witnesses for the company, testify that there was but one whistle west of Twenty-eighth street. Nor is the plaintiff sustained by any of his own witnesses as to the second whistle.

If the court below had left the jury to find negligence from the use of the whistle the second time, if they believed it to have been so used, provided the engineer saw, or with proper care might have seen the plaintiff's wagon, and that his horse was becoming unmanageable, there would have been no error. But he submitted the case to the jury in such a way as left them at liberty to find negligence from the use of the whistle once at or about Thirtieth street. It must be borne in mind that the Philadelphia, Wilmington and Baltimore Railroad runs along Washington Avenue in this city until it reaches a point opposite to the United States Arsenal, situated on the west side of Gray's Ferry Road, between Twenty-sixth and Twenty-seventh streets. It there turns, enters upon the company's grounds alongside of the Gray's Ferry Road, and runs parallel with that road a short distance from it, and several feet above its grade, to the bridge over the Schuylkill river. The road makes several curves, one at the Arsenal, another just east of Twenty-eighth street, and the third half a square beyond Thirty-first street. These curves are all so decided that the road can be seen for a short distance only beyond them; the Gray's Ferry Bridge and the last two road-crossings being invisible until the last curve has been passed, a point above Thirty-second street. Between Twenty-eighth street and the Schuylkill there are four road-crossings over the railroad, the bridge being about three squares beyond the last crossing. The bridge is a drawbridge, a watchman being stationed at each end for the purpose of flagging the trains, upon being warned by the whistle of their approach.

It was the daily practice to blow the whistle at Thirtieth street. The rules of the company required it. We have seen that there were several crossings, as well as the bridge-tender, to be warned of the approaching train. They were invisible by reason of the curves. The engineer had the right, under the circumstances, to blow the whistle in the vicinity of Thirtieth street sufficiently to give notice of the approach of the train. Its use once, in the ordinary manner, was not evidence of negligence, and it ought not to have been submitted to the jury as such. On the contrary, had he omitted to give such warning, and by reason thereof the plaintiff had been struck and injured by the train, we should have been compelled to say, under the authority of our own cases, that such omission was negligence *per se*.

It was urged that any use of the whistle at this point was unnecessary, and the fact that it has since been abandoned was stated as strong evidence in support of this view. The abandonment, however, was doubtless due in a great measure to the changed circumstances. This locality has been much improved since 1871, and there are many more houses there now than formerly. We have held these corporations to a strict line of responsibility for the failure to give sufficient warning of the approach of their trains at road-crossings. It would not be just to them, nor perhaps safe to the travelling public, for us now to criticise too closely the precise amount of noise employed in giving the needed warning at such places, or the means of producing it.

There was also error in the answer of the learned judge to the defendant's sixth point. It is true, the law will not banish horses from the highways. It is equally clear that the plaintiff had a right to drive this particular horse, or any other horse, however vicious, upon the Gray's Ferry Road, at this particular point of danger. We are not dealing with the absolute rights of the parties. The question here is one of prudence and care. Where a man drives an unbroken or vicious horse, or one that is easily frightened by a locomotive, along a public road running side by side with a railroad, and liable to be met or overtaken by a train, he does so at his own risk. It is an act amounting to recklessness. That there was no other road for the plaintiff to use does not matter. There were other horses which he might have procured for use in such a dangerous locality. Duties and obligations are mutual. The railroad company had as high a right to move their trains

upon their road as the plaintiff had to drive his horse along Gray's Ferry Road. Both were bound to the exercise of care in accordance with the circumstances of the case.

We do not lose sight of the fact that in such questions as this the interests of other parties are concerned. The right of a man to risk his own life, and that of his horse, may be conceded; but not the right by an act of negligence, if not of recklessness, to place in peril the lives of hundreds of others who may happen to be travelling in a train of cars.

What we have said disposes of the third and sixth assignments of error. The remaining assignments are carved out of the two just mentioned, and do not need more specific notice.

The judgment is reversed, and *venire facias de novo* awarded.

Supreme Court of Pennsylvania.

PENNSYLVANIA RAILROAD CO. *v.* LEWIS ET UX.

A boy over eight years of age was sent on an errand by his mother, which required him to cross a railroad track. He took a short cut along the track, and was overtaken and killed by a train going in the same direction. The place where the boy was killed was within the limits of a city, and the train was moving at a rate of speed between eighteen and twenty-five miles an hour.

Held, that the question of contributory negligence in the parent and child was for the jury, and that the same amount of care could not be demanded from a child as from an adult.

Held, further, that regard must be had to the habits, character, condition and circumstances of people living in a city and along the line of a railroad, in ascertaining what degree of care is necessary in running trains upon the outskirts of a city, and that an admitted trespass upon the road would not necessarily bar an action for damages.

CASE to recover damages caused plaintiffs by the death of their minor son. Plea, "Not guilty."

Upon the trial the plaintiffs' evidence was, in substance, as follows: The plaintiffs resided on the line of the Pennsylvania Railroad, near Harrisburg, one quarter of a mile below and to the east of the Lochiel Mills. On November 22d 1869, Mrs. Lewis, the mother of the deceased, sent the deceased, a boy of eight and a half years, on an errand. A wagon road ran along the side of the track till it came to the Mills, where two ways were open to the boy; he might go on up the railroad, or he might make a circuit round the mill, a way which was twice as long as the other. Just